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No. 01-1489

IN THE
SUPREME COURT OF THE UNITED STATES

NATIONAL ELECTRICAL MANUFACTURERS ASSOCIATION,

Petitioner,

v.

WILLIAM H. SORRELL, As Attorney General of the State of Vermont, SCOTT JOHNSTONE, As Secretary, Vermont Agency of Natural Resources,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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CORPORATE DISCLOSURE STATEMENT

The National Electrical Manufacturers Association is a not for profit corporation that has neither a parent nor stockholders.

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The Petition established that certiorari is warranted because Second, Third and Seventh Circuit decisions holding that the *Pike* balancing test can only be applied to laws that have a disparate or discriminatory effect on interstate commerce conflict with Fifth, Sixth, Eighth and Tenth Circuits decisions and with this Court's repeated holding that the *Pike* test applies to nondiscriminatory laws that "regulate evenhandedly." Nothing in the State's opposition undermines the existence of this conflict on an important constitutional issue or the suitability of this case as a vehicle for resolving it.

1. Vermont does not contest what the Petition plainly demonstrates: This Court consistently has held that no discriminatory effect is required for a statute to be reviewed or held unconstitutional under the balancing test of *Pike v. Bruce Church*, 397 U.S. 137, 142 (1970). *See* Pet. 13-14 (collecting cases). Indeed, while Vermont quotes a footnote in *General Motors Corp. v. Tracy*, 519 U.S. 278, 299 n.12 (1997), for the proposition that "'several cases that have purported to apply the undue burden test (including *Pike* itself) arguably turned in whole or in part on the discriminatory character of the challenged state regulations,'" Opp. 13, that very footnote goes on to confirm the Petition's point: "[O]ur cases have indicated that even *nondiscriminatory* state legislation may be invalid under the dormant Commerce Clause, when ... 'the burden imposed on interstate commerce is clearly excessive in relation to the putative local benefits.'" 519 U.S. at 299 n.12 (citing cases and quoting *Pike*) (emphasis added); *see also Brown-Forman Distillers Corp. v. New York State Liquor Authority*, 476 U.S. 573, 578-79 (1986)(*Pike* balancing applies to state laws that have "only *indirect* effects on interstate commerce and regulate[] *evenhandedly*")(emphasis added).

In square conflict with the law of this Court, the Second, Third and Seventh Circuits have held that proof of discrimination against interstate commerce is necessary before *Pike* balancing will even be undertaken. Pet. 14-15.

Vermont suggests that this Court's cases, although "not suppl[ying] a precise definition," have nevertheless "suggested" that an "incidental burden" within the meaning of *Pike* equates to "a burden on interstate commerce that is qualitatively or quantitatively different from that imposed on intrastate commerce." Opp. 11. This is legerdemain.

This Court has never used the terms "incidental" or "indirect" burden to describe laws that discriminate against interstate commerce. Rather, those terms describe the impact on interstate commerce of those laws that regulate *evenhandedly* as to interstate and intrastate commerce, and therefore should be evaluated under the second-tier *Pike* balancing test, rather than under the first-tier test that applies a virtual *per se* rule against laws that discriminate against or directly regulate interstate commerce either facially or in their practical effect. As this Court has explained:

> Over the years, the Court has used a variety of formulations for the Commerce Clause limitation upon the States, but it consistently has distinguished between outright protectionism and more *indirect* burdens on the free flow of trade. The Court has observed that where simple economic protectionism is effected by state legislation, a virtually per se rule of invalidity has been erected.... In contrast, legislation that *visits its effects equally* upon both interstate and local business may survive constitutional scrutiny if it is narrowly drawn. The Court stated in *Pike v. Bruce Church,*

> *Inc.*...: "Where the statute *regulates evenhandedly* to effectuate a legitimate local public interest, and its effects on interstate commerce are only *incidental*, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits...."

Lewis v. BT Inv. Managers, Inc., 447 U.S. 27, 36 (1980)(emphasis added); *see also, e.g., Oregon Waste Systems, Inc. v. Dept. of Env. Quality of State of Oregon,* 511 U.S. 93, 98-99 (1994) (balancing test applies to *"nondiscriminatory* regulations that have only *incidental* effects on interstate commerce") (citing *Pike*) (emphasis added); *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979) (balancing test applies where "the challenged statute regulates *evenhandedly* with only *incidental* effects on interstate commerce") (citing *Pike*) (emphasis added).

Thus, under this Court's precedents, the term "incidental burden" describes the effect on interstate commerce that results from a nondiscriminatory statute that regulates interstate and intrastate commerce evenhandedly, not the converse, as Vermont contends by equating the term with that used by the Second Circuit to describe its superimposed prerequisite for *Pike* balancing—an "unequal" or "disproportionate" burden that is "qualitatively or quantitatively different from that imposed on intrastate commerce." *See* Pet. 14-15. The district court applied the correct legal standard in enjoining the Vermont labeling law based upon the extensive evidence presented during a three-day trial. [1]

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[1] Vermont's contention that mercury containing lamps constitute a significant source of environmental mercury (Opp. 1, 3) is belied by the district court's explicit finding that "[e]ven if the [Vermont labeling] law (...continued)

Vermont purports to find comfort in the fact that, out of this Court's many dormant Commerce Clause cases, two upheld statutes "without applying or even discussing the *Pike* balancing test." Opp. 14. But it is undisputed that the *Pike* balancing test *exists* and is available to a plaintiff that has properly invoked it. The issue here is the circumstance under which the balancing mandated by *Pike* and its progeny must be exercised. Cases that do not "apply[] or even discuss[]" *Pike* are not relevant to that question.[2]

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were to operate as envisioned, it only addresses, at great cost to manufacturers and increased price to consumers, *a very small portion of the problem* of mercury entering the environment." Pet. App. 31-32 (emphasis added); *see also* JA 361-62 (EPA figures show that fluorescent lamps represent half a percent of mercury releases to the environment). Similarly, Vermont's recitation of the purported availability of "mutually agreeable alternatives to the labeling requirement upon a manufacturer's demonstration that it cannot reasonably comply with the labeling law" (Opp. 2) is belied by the district court's observation that "[p]rior to instituting this suit, NEMA and [respondents] apparently engaged in unsuccessful attempts to resolve this matter," Pet. App. 29, and by the clear record establishing that no "mutually agreeable alternatives to the labeling requirements" could be reached. *See* JA 66-95 (seven pre-litigation letters between the parties over a six-month period regarding NEMA's request for, and the state's rejection of, "Lamp Manufacturers Request for an Alternative Label").

[2] In this connection, Vermont erroneously claims that "[i]n this case NEMA argued that the statute burdens interstate commerce in two ways: (1) by controlling commerce that occurs wholly beyond Vermont's borders; and (2) by imposing regulatory requirements that risk being inconsistent with those of other states." Opp. 11 (citing Second Circuit opinion below). But as NEMA clearly explained in its Petition: "In the court of appeals, NEMA had argued that these features of the Vermont labeling law provided independent grounds for invalidating the law under the Commerce Clause, separate from the *Pike* balancing test." Pet. 9 n.3. NEMA's brief in the court of appeals plainly made this distinction. Pet. C.A. Br. at iii, 45-61.

2. Vermont does not dispute that the Tenth Circuit's interpretation of *Pike* in *Dorrance v. McCarthy*, 957 F.2d 761 (10th Cir. 1992), is in direct conflict with that adopted by the Second, Third and Seventh Circuits. *See* Pet. 14-16. Nor does the state dispute (or even cite) the Tenth Circuit's re-affirmation of that interpretation in *Blue Circle Cement, Inc. v. Board of County Com'rs of County of Rogers*, 27 F.3d 1499, 1511-12 (10th Cir. 1994). *See* Pet. 16. Vermont instead asserts that a later panel opinion in the Tenth Circuit abandoned *Dorrance*. Opp. 3-4 (citing *V-1 Oil Co. v. Utah State Dept. of Pub. Safety*, 131 F.3d 1415 (10th Cir. 1997)).

This claim cannot be reconciled with *V-1 Oil*'s explicit reaffirmation of *Dorrance* as the authoritative "appl[ication of] *Pike* principles" in the Tenth Circuit. 131 F.3d at 1424. Consistent with *Dorrance*, *V-1 Oil* specifically held that it was *not* confining its *Pike* inquiry to whether "the burdens on interstate commerce ... exceed the burdens on intrastate commerce." 131 F.3d at 1425.[3] Tenth Circuit law on this question is confirmed by that court's subsequent citation of *V-1 Oil* itself in applying *Pike* balancing to strike down a state law without requiring that the "indirect" burdens imposed by the statute on interstate commerce were "discriminatory" or otherwise "unequal" compared with the burden imposed on intrastate commerce. *See American Civil*

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[3] The court held that the relevant burdens for balancing under *Pike*, regardless of the kind or extent of the burdens placed by the challenged law on intrastate commerce, "*also include* the disruption of [interstate] travel and shipping due to a lack of uniformity in state laws, impacts on commerce beyond the borders of the defendant [S]tate, and impacts that fall more heavily on out-of-state interests." *Id.* (emphasis added).

Liberties Union v. Johnson, 194 F.3d 1149, 1161-62 (10th Cir. 1999).[4]

The Fifth, Sixth and Eighth Circuits have also applied *Pike* to strike down statutes that lacked the discriminatory effect that the Second, Third and Seventh Circuits have deemed essential. Pet. 16-18. Cases in each circuit would have been resolved differently if the Second Circuit test had been applied. Although Vermont contends that *Service Mach. & Shipbuilding Corp. v. Edwards*, 617 F.2d 70 (5th Cir.), *aff'd mem.*, 449 U.S. 913 (1980), held the ordinance at issue unconstitutional as "'facially discriminat[ing] in favor of local residents,'" Opp. 9, the Fifth Circuit in fact applied the ordinance's "savings clause [to] read out the ordinance's facial discrimination against interstate commerce," 617 F.2d at 75, and then proceeded to strike down the law's remaining portion under *Pike, id.* at 76. *See also Ford Motor Co. v. Texas Dept. of Transp.*, 264 F.3d 493, 502-03 (5th Cir. 2001) (statutes that do not discriminate "either facially or in practical effect" are subject to *Pike* balancing).

Vermont implicitly concedes that the Eighth Circuit's decisions in *Burlington Northern R.R. Co. v. Nebraska*, 802 F.2d 994, 1004 (8th Cir. 1986), and *U & I Sanitation v. City of Columbus*, 205 F.3d 1063 (8th Cir. 2000), conflict with the Second Circuit, by holding that non-discriminatory laws are to be evaluated under the *Pike* balancing test. Vermont purports to reconcile *Burlington Northern* on the ground that the Second Circuit has deemed a "regulat[ion of] the means of interstate transportation" to be "of special interest under

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[4] The *Johnson* court held that the New Mexico law at issue was unconstitutional for other reasons as well, but its opinion makes plain that those holdings were not a prerequisite to its separate holding under the *Pike* balancing test. 194 F. 3d at 1161-62.

the Commerce Clause," and *U & I Sanitation* on the ground that waste flow control laws can burden interstate commerce. But these observations, even if accurate,[5] would be relevant only if the *Eighth Circuit* had based its decisions upon that reasoning. It did not.

Moreover, the Eighth Circuit's decision in *Pioneer Military Lending, Inc. v. Manning*, 2 F.3d 280 (8th Cir. 1993), did not turn, as Vermont claims (Opp. 9), on whether in-state firms were burdened by the challenged law to the same extent as out-of-state firms. Rather, the Eighth Circuit, in a straightforward application of the *Pike* balancing test, struck down the admittedly non-discriminatory law because "the burden Missouri's small loan laws would place on interstate commerce when applied to Pioneer's operation [lending to non-state-residents living on a federal military base] is great compared to the relatively slight local interests served by imposition of its regulatory scheme to Pioneer's loans to non-residents stationed at [the base]." 2 F. 3d at 285.

Although Vermont suggests (Opp. 9) that the Sixth Circuit struck down as a ""direct regulat[ion of] interstate commerce"" the Michigan law at issue in *ANR Pipeline Co. v. Schneidewind*, 801 F.2d 228 (6th Cir. 1986), *aff'd on other grounds*, 485 U.S. 293 (1988), the Sixth Circuit's opinion explained that the court was "proceed[ing] to the second tier [under] *Pike*" and it struck down a nondiscriminatory law because "the burdens of expense, delay, and administrative hassle of 'advance approval' securities regulation far outweigh the benefits, if any, of Michigan's interests in

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[5] No "special" or particular dormant Commerce Clause analysis is applicable in transportation or solid waste cases; standard dormant Commerce Clause analysis applies in both types of cases. *See, e.g., Raymond Motor Transport v. Rice*, 434 U.S. 429 (1978); *Oregon Waste Systems, supra.*

protecting consumers and investors." 801 F.2d at 238. Moreover, the Petition's citation to *McNeilus Truck and Mfg., Inc. v. Ohio ex rel. Montgomery*, 226 F.3d 429, 444 (6th Cir. 2000)(Pet. 17), made clear that the Sixth Circuit application of *Pike* there was an alternative holding, but one quite relevant here, given that court's conclusion that "[e]ven if the statute [were] *not* so obviously discriminatory ... we would still find that the burden it imposes is clearly excessive in relation to the putative local benefits." *Id. at* 444 (emphasis added).

The conflict among the circuits on this critical Commerce Clause question cannot be gainsaid.

3. This case is a suitable vehicle for resolving the important legal issue presented by this Petition. The court of appeals plainly ruled, as a matter of law, on the purported deficiencies of NEMA's claim arising under *Pike*. No factual or legal issue remains to be developed in the lower courts concerning the question presented. Vermont does not identify any way in which the Commerce Clause issue raised by the case in its current posture would be better presented were review by this Court postponed. That issue is an important and recurring one (*see* Pet. 21-22), and as the amicus brief of the Electronic Industries Alliance and National Association of Manufacturers demonstrates, of great practical importance. The Court should take this opportunity to resolve it.

Vermont half-heartedly contends that the Petition is "not precisely correct" in observing that the court of appeals "did not overturn any [of the district court's] findings of fact." Opp. 16. Vermont observes that the Second Circuit "question[ed] some of the district court's findings, expressing skepticism about the 'true costs of labeling over time.'" Opp. 16. But "questioning" or "expressing

skepticism" in no way equates with overturning a factual finding as "clearly erroneous," which would have required an appellate court determination based "on the entire evidence" that it is "left with the definite and firm conviction that a mistake has been committed." *Easley v. Cromartie*, 532 U.S. 234, 242 (2001).

The Second Circuit made no such determination because it reversed the district court's application of the *Pike* balancing test based solely upon its erection of a "disparate burden" prerequisite to the judicial exercise of *Pike* balancing. The correctness of that ruling of law is squarely presented for this Court's consideration.

Finally, Vermont recites several evidentiary rulings by the district court with which it disagrees. Opp. 17-18. But as the State concedes, the Second Circuit did not reach any of these issues, Opp. 17, which were committed to the district court's sound discretion and thus would be highly unlikely to be reversed by a court of appeals. None of these alleged evidentiary errors presents a certworthy issue or an obstacle to this Court's resolution of the question presented by the Petition. [6]

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[6] Although Vermont claims that several states were precluded from filing an amicus brief (Opp. 3), the district court in fact accepted that brief for filing, and only foreclosed these non-parties' improper effort to submit factual affidavits by persons who neither intended to appear as witnesses nor otherwise be subject to cross-examination (*see* Opp. 3 n.4). Furthermore, the district court quite properly declined to rely on the affidavits of two Vermont witnesses who neither attended the trial nor appeared by deposition. (*see* Opp. 3).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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